

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2132

TO BE ARGUED BY
ROY M. COHN

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT COURT

CARMINE GALANTE,

Petitioner-Appellant,

-against-

THE WARDEN, METROPOLITAN CORRECTIONAL CENTER,
and THE UNITED STATES PAROLE COMMISSION,

Respondents-Appellees.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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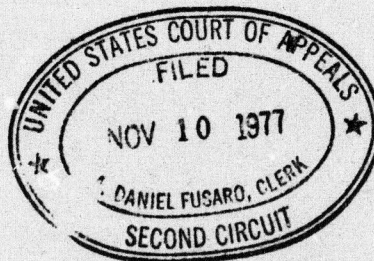


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ISSUES PRESENTED

- 1) Whether a mandatory releasee should be admitted to bail pending conclusion of parole revocation proceedings when he has been neither charged with nor has been convicted of a subsequent criminal act.
- 2) Whether the 1976 Amendments to the Parole Commission Act in any way diminished the availability of bail to a mandatory releasee facing possible parole revocation.
- 3) Whether the Court below employed improper and inapplicable criteria in denying bail to appellant.
- 4) Whether the denial of bail in the court below constituted an abuse of discretion.
- 5) Whether the election of the Parole Commission to proceed by summary warrant rather than summons was arbitrary and capricious, constituted an abuse of discretion and was violative of due process.
- 6) Whether the failure of the United States Parole Commission for the Northeast Region to ever implement the summons procedure is violative of Congressional intent.
- 7) Whether a mandatory ~~releasee~~ not charged with a subsequent crime must show unusual circumstances and a high probability of success in order to be admitted to bail pending final determination of the revocation proceedings.
- 8) Whether unusual circumstances and a high probability of success has been demonstrated in this case.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT COURT

-----X

CARMINE GALANTE,

Petitioner-Appellant,

- against -

THE WARDEN, METROPOLITAN CORRECTIONAL
CENTER, and THE UNITED STATES PAROLE
COMMISSION,

Respondents-Appellees.

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BRIEF ON BEHALF OF PETITIONER-APPELLANT

PRELIMINARY STATEMENT

This brief is submitted on behalf of the petitioner-appellant, Carmine Galante, from the dismissal of his writ of habeas corpus which sought his release on bail pending determination of his parole revocation. On October 27, 1977, the Honorable Robert J. Ward, United States District Judge, Southern District of New York, denied the writ, but found a substantial question which he felt should be determined by this Court* (2A). This appeal is being heard on an expedited basis pursuant to an order of this Court entered November 4, 1977. This case presents this Court with its first opportunity to review the implementation of the summons versus warrant procedure as instituted by the 1976 Amendment to the Parole Commission Act.

* References denoted "A" refer to Appellant's Appendix; those denoted "Tr." refer to transcript below.

STATEMENT OF FACTS

In January, 1974, the appellant was released after serving twelve years of a twenty year sentence for narcotics conspiracy and contempt (6A). His release was not due to any generosity on the part of the United States Parole Commission, but rather that based upon the time necessarily credited to him due to good behavior, he was mandatorily released (6A). From January, 1974 through October, 1977, there was not the slightest hint of any problem in his parole. He regularly reported to the various probation officers assigned to his case, sought permission whenever he wished to leave the metropolitan area, and generally comported himself as a model parolee. His counsel were in constant telephonic and written communication with the probation authorities and expressed a desire to work with them should any question arise. Until October, 1977 no such problem appeared (18A-19A).

In early October, 1977 word reached Galante's counsel that the United States Parole Commission intended to violate Galante's parole (43A). Despite attempts by counsel to arrange for appellant's voluntary and orderly surrender, representatives of the United States Marshal's office scoured the area on October 7 in the apparent hope of incarcerating Galante over the long Columbus Day weekend (38A). Finally, on October 8, counsel was able to arrange with Executive Assistant United States Attorney T. Barry Kingham to surrender Galante on October 11. At approximately 7:30 a.m. on October 11 Mr. Galante surrendered and was immediately incarcerated in the

Metropolitan Correctional Center. He has been detained there ever since, although not charged with any criminal offense (43A).

Curiously, even at this juncture, neither Galante nor his counsel had obtained a copy of the warrant or the specifications of the alleged violations (43A). This was in spite of the fact that on Saturday, October 8, Michael Rosen, Esq., one of Galante's attorneys, had sought to obtain a copy. As ~~as~~ as October 10, 1977, the warrant could not be located at the Marshal's office. It was not until approximately 9:00 a.m. on October 11, an hour and a half after Galante surrendered, that his attorneys were given a copy of the warrant and application (43A), which charged Galante, in some 45 instances, with associating with individuals with criminal records. Almost immediately Probation Officer Joseph Loughran appeared and stated that he was ready for the preliminary interview.* Although Galante, through counsel, stated that he generally denied the charges, Loughran insisted that appellant respond to each allegation. Counsel stated that he had not had the opportunity to discuss, analyze and investigate the allegations, having only just received them. Loughran referred the issue of bail to the Parole Commission on the District Court, and

* Pursuant to statute, 18 U.S.C. §§4201 and ff., a preliminary interview is conducted to determine if probable cause exists to believe that a parolee has violated the terms and conditions of his parole. If such cause is found, a full revocation hearing is then conducted.

when questioned as to discovery, said that he had to check, as he was not familiar with that. Thereafter we requested an adjournment solely on the basis of the lack of time provided to examine and investigate the charges (43A-44A).

On the same day, appellant sought release on bail under a writ of habeas corpus pursuant to 28 U.S.C. §2241. The matter was assigned to the Honorable Robert J. Ward, who, with the consent of the United States Attorney, directed that Galante remain in the Southern District of New York until further order of the Court. Brief argument was held that day, further papers were submitted, and more extensive argument conducted on October 14, 1977 (12A-13A).

In the court below appellant asserted that the court had the authority to release him on bail pending final determination of his parole status. Counsel for the appellees conceded that the Court had such authority (Tr. 121 - 10/14/77). Pursuant to a 1976 revision to the Parole Commission Act, the Commission, in instituting a parole revocation proceeding had the option of proceeding by summons (and thus permitting the parole to remain at large) or to cause his arrest by the issuance of a warrant. Appellant argued in the Court below and does again to this Court that the determination to proceed by warrant rather than summons, under the facts and circumstances of this case, constituted an abuse of discretion and was violative of due process.

On October 18, 1977 a preliminary interview was conducted by Probation Officer Joseph Hurley. The results of

that hearing were shocking. Of the 45 original allegations against Galante, only 18 were found at that stage to be of such substance as to merit a finding of probable cause (74A and ff.). Furthermore, a key phrase in a letter from Joel Moss, Galante's present probation officer, concerning Mr. Galante's asserted "arrogance" was discovered to have been inserted by a supervisor who had never even met Galante.* Interestingly enough, the probation officers who testified at the preliminary interview all stated that they had not reviewed the terms and conditions of his release with him which included the sanction proscribing his association with persons with criminal records (69A-70A, 86A).

The revelations continued. It developed that Moss, unaware of the existence of the summons procedure, had recommended the issuance of a warrant and thus never requested or considered the use of the summons procedure. Even this request had a rather strange origin. Apparently at a meeting with members of the Probation Department, Chief Assistant United States Attorney William Tendy, who had formerly prosecuted Galante, became one of the prime movers in this process of reincarcerating Galante. At the meeting, Tendy, while holding aloft newspaper stories about Galante, jumped up and down imploring, "What are you going to do about this?" (72A, 86A).

After these interesting discoveries and the findings of Mr. Hurley that approximately 60% of the alleged violations lacked probable cause,**further arguments were conducted before Judge Ward. On October 27, 1977 Judge Ward denied the petition

*There could have been no truthful basis for inserting the statement under someone else's signature.

**Their resultant dismissal left less than 40% of the charges remaining.

but issued a certificate of probable cause (2A). A Notice of Appeal was filed on October 28 (3A), and on November 4 this Court directed an expedited appeal.

This is the first time since 1976 that a mandatorily released parolee has been denied bail pending parole revocation hearings, despite the fact that there has been no allegation of a criminal conviction or even charge, no explanation of the standards in using summons procedure, with "frequency of association" now exploded by over 60% failing under probable cause--every other case is far less compelling by its fact pattern than here. In each of those cases, as will be demonstrated below, bail was granted.

ARGUMENT

POINT I: APPELLANT SHOULD BE ADMITTED TO BAIL PENDING THE TERMINATION OF THE PAROLE REVOCATION PROCEEDINGS.

Unquestionably this Court, as did the District Court, has the authority to admit appellant to bail under the circumstances herein. This was conceded by the appellees in the court below (Tr. 121 - 10/14/77). This power is based upon this Court's determination in the leading case of Argro v. United States, 505 F.2d 1374 (2nd Cir. 1974). This authority has been exercised in several cases in this Circuit wherein the facts were far less compelling than here. United States v. Schreiber, 367 F.Supp. 791 (E.D.N.Y. 1973); Ciambrone v. United States Parole Commission, 77 Civ. 356 (E.D.N.Y. 2/24/77); Berardelli v. Taylor, 77 Civ. 1792 (S.D.N.Y. 4/15/77).

Each of those cases, as well as Argro, involved actual allegations or convictions for criminal offenses subsequent to the parolee's release on the prior charge. In the instant case there is no allegation of subsequent criminal activity but merely, at this point, the nebulous charge of association with persons with criminal records on 18 occasions (out of an original 45) over a period of one year. Significantly, there are no charges between January, 1974, the date of appellant's release, and August, 1976.

Since 1974, the appellant and his counsel offered to meet with representatives of the Probation Department should any problems arise as to Mr. Galante. Not once during this entire time period was there any hint of trouble (36A-37A,

85A and 86A). The reason for such concern was obvious - the appellant, having spent 12 years in prison, did not wish to be faced with difficulties due to a repeatedly vicious media attack on Galante. These inquiries were merely one of several attempts by Galante and his counsel to comply with the terms of his release although, as it developed at the preliminary interview, these terms were never explained to Galante by any representative of the Probation Department (71A; 86A). Whenever Galante desired to leave the Metropolitan area, even to travel to New Jersey for a football game, prior approval of the Probation Department was obtained. Indeed, as demonstrated in the court below, even these authorized trips met with harassment on several occasions and one resulted in an official apology from the police (37A).

In spite of the constant communications and cooperation on Galante's part, the Commission arbitrarily determined to proceed by warrant (and its attendant summary incarceration) rather than the summons procedure (18 U.S.C. §4213(a)). We submit that in view of the nebulous and speculative charges herein as well as the summary reduction of their number, this would have been the proper procedure to comport with the due process requirement of Morrissey v. Brewer, 408 U.S. 471 (1972).

Furthermore, when one must consider that the news media had known of the grounds for the attempted revocation for several days while United States Marshals were combing the City looking for the appellant, counsel for the appellant,

despite repeated requests, did not receive a copy of the warrant until after appellant's surrender.

In Argro v. United States, supra, and United States v. Schreiber, supra, as stated above, both parolees were convicted of state crimes while on federal parole. In spite of this, Judge Dooling, in Schreiber, held that although the parolee had pleaded guilty to a crime while on parole, this did not foreclose bail:

"But that neither decides that there is no power to admit to bail nor excludes the conclusion that due process certainly commands if it does not require consideration of the question whether this defendant should not be admitted to bail if the individual circumstances of defendant's case make postponement of recommitment until the Board of Parole acts the course which a careful weighing of the values involved dictates." United States v. Schreiber, supra, at 792.

In Argro, supra, not only did this Court, in an opinion by Justice Gurfein, determine that bail is available to a parolee facing possible revocation, but that a writ of habeas corpus is the proper vehicle to admit him to bail. Argro v. United States, supra, at 1375, fn. 1; see also, Jones v. Johnston, 534 F.2d 353 (D.C.Cir. 1976). The Second Circuit remanded Argro based on the fact that the parolee's subsequent state conviction had been affirmed on appeal. However, the Court did recognize the availability of bail in this situation:

"Implicit in that direction, of course, is the conclusion that the district judge did have the powers to grant bail in this matter. While there is no constitutional right to bail in these circumstances, see In re Whitney, 421 F.2d 337 (1st Cir. 1970), we think there may be adequate grounds to

support its grant in unusual cases, at least in a bona fide inquiry into whether a parole revocation is being conducted pursuant to due process. See Baker v. Sard, 132 U.S. App. D.C. 139, 420 F.2d 1342 (1969); Johnston v. Marsh, 227 F.2d 528 (3rd Cir. 1955)." Argro v. United States, supra, at 1377.

Furthermore it has been held that based upon Morrissey v. Brewer, supra, a parolee's liberty is a fundamental interest which should be protected:

"The essence of both [parole and probation] is a grant of conditional freedom which 'although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee.' (Morrissey v. Brewer (1972), 408 U.S. 471, 482, 92 S.Ct. 2593, 2601, 33 L.Ed. 2d 484) Accordingly, the parolee's liberty has been found to be valuable and within the protection of the fourteenth amendment (Morrissey v. Brewer (1972), 408 U.S. 471, 482, 92 S.Ct. 2593, 33 L.Ed.2d 484.) While the liberty insured by the Constitution is not the conditional liberty granted to parolees, it is clearly protectible as a fundamental interest." People ex rel. Tucker v. Kotsos, 42 Ill. App.3d 812, 356 N.E.2d 798, 802, (App.Ct. of Ill., 1st Dist., 4th Div. 1976).

In Ciambrone, the petitioner had been charged with a criminal act subsequent to his parole, but, although acquitted of that charge, a parole violation warrant was issued. In Berardelli, although the petitioner was convicted before the Honorable John R. Bartels of the Eastern District of New York, Judge Edward Neaher (as did Judge Stewart in Ciambrone) admitted him to bail.

Unquestionably, this Court, in Argro, recognized the availability of bail to a parolee facing revocation, even if the revocation would be based upon conviction for a crime while on parole. Although the Court concluded (at page 1378)

that in such a situation (i.e., upon conviction), bail would "be proper only under the most unusual circumstances," the availability of bail is clear.

We submit that since bail is available and, as pointed out above, particularly under the facts of this case, the issue of revocation is unclear, bail should be granted. Not every violation of parole results in revocation. Morrissey v. Brewer, supra. Both the appellant in this case and the government have an interest in appellant remaining at large - the former obviously to retain his liberty, while the latter not to interrupt successful rehabilitation. Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973); Morrissey v. Brewer, supra, at 484 [fair treatment enhances chance of rehabilitation].

As previously pointed out (18 U.S.C. §4214(d)), revocation and incarceration are not automatic. It is a two-step process in which the Parole Commission must first challenge the parolee's right to continue at large and then determine, through at least two hearings, what the solution should be. Morrissey v. Brewer, supra, at 479-480. The Supreme Court has realized that substantial time may pass between arrest and revocation (which is not automatic). Morrissey v. Brewer, supra, at 484, 488. The loss of liberty for a parolee would unquestionably be a "grievous loss" in this case, where there is no clear violation of parole and where the final result is far from certain. Morrissey v. Brewer, supra, at 482. We submit that based upon the applicable law and the appellant's unblemished record since his release on parole, this Court

should properly grant the writ and admit petitioner to reasonable bail.

POINT II: THE COURT BELOW EMPLOYED
INAPPLICABLE CRITERIA IN DENYING
THE APPLICATION

The Court below based its denial of the writ of habeas corpus, in part, upon an alleged failure to show "unusual circumstances." Argro v. United States, supra.; Calley v. Callaway, 496 F.2d 701 (5th Cir. 1974). Even assuming that the appellant failed to demonstrate "unusual circumstances" (which circumstances, we submit, he did show), this is not a necessary element for bail under the instant situation. Both Argro and Calley*, primarily base their decisions on Aronson v. May, 85 S.Ct. 3, 13 L.Ed 2d 6 (1964) (opinion of Douglas, J., on application for bail). In Aronson, the petitioner once again sought to collaterally attack his conviction and sought bail in that regard. Initially the District Court admitted petitioner to bail, but then reversed itself. The Ninth Circuit Court of Appeals also denied bail. After a recitation of the facts, Justice Douglas realized that "special reasons" had to be shown. As Justice Douglas pointed out:

"This Court's Rule (49(4)) provides:

'Except as elsewhere provided in this rule, the initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the court of appeals but also the further possible review in this court; and only where special reasons therefor are shown to the court of appeals or to this court or to a judge or justice of either court will that order be disturbed, or any independent order made in that regard.'

* Of course, Calley itself is distinguishable. In that case, Calley pursuant to 28 U.S.C. § 2255, sought to collaterally attack a judicially imposed sentence pursuant to a military conviction.

Thus the initial order of the District Court concerning the prisoner's custody controls unless modified or superseded by an appellate order issued for 'special reasons.'" Aronson v. May, supra, 13 L.Ed. 2d at 8.

It is therefore obvious that the special reasons or circumstances rule does not mean that which is demonstrated by the applicant in his initial request for bail, but rather that on appeal, that determination will not be disturbed without a showing of special reason or circumstances. Furthermore, it is clear that Judge Ward misinterpreted the "special circumstances" requirement.

As an example of "special reasons," Justice Douglas went on to reject that claim in Aronson saying:

"Clearly the most important 'special reason', the finding of which is a prerequisite to any modification I might make of the lower courts' refusal to grant bail, would be that the pending appeal presents substantial questions. Without in any way prejudging its merits, I must confess to serious doubt about the substantiality of those questions." Aronson v. May, supra, 13 L.Ed. 2d at 8.

Justice Douglas was thus laying the early ground work for "special reasons" when dealing with a person incarcerated and collaterally attacking his conviction. In that case, Justice Douglas set forth the substantial question test. In the instant case, although Judge Ward denied the petition, he did find a substantial question:

"Inasmuch as the Court believes that this petition poses a question of law upon which the Court of Appeals should rule, the Court will issue a certificate of probable cause." (2A)

The strict requirements set forth in Aronson were limited to the circumstances of that case. The Court below apparently misread the key language of Aronson:

7 "This applicant is incarcerated because he has been tried, convicted and sentenced by a court of law. He now attacks his conviction in a collateral proceeding. It is obvious that a greater showing of special reasons for admission to bail pending review should be required in this kind of case than would be required in a case where applicant had sought to attack by writ of habeas corpus an incarceration not resulting from a judicial determination of guilt. Cf. Yanish v. Barber, 97 L.Ed. 1637, 73 Sup. Ct. 1105 (1953)." Aronson v. May, supra. 13 L.Ed. 2d at 9.

Clearly, in the instant case not only have we unnecessarily met the "special reasons" test of Aronson, but we are further faced with "an incarceration not resulting from a judicial determination of guilt."

It is clear that herein we are not dealing with a collateral attack upon a prior final determination of a court or administrative agency. This is the principle for which Calley must be read. The language upon which the government relies in Calley is as follows:

"Bail should be granted to a military prisoner pending postconviction habeas corpus review only when the petitioner has raised substantial constitutional claims upon which he has a high probability of success, and also when extraordinary or exceptional circumstances exist which make the grant necessary to make the habeas remedy effective. See Aronson v. May, 1964, 85 S.Ct. 3, 13 L.Ed 2d 6 (Douglas, J. on application for bail);

Glynn v. Donnelly, 1 Cir., 1972, 470 F.2d 95; Woodcock v. Donnelly, 1 Cir., 1972, 470 F.2d 93; Benson v. California, 9 Cir.; 1964, 328 F.2d 159, cert. denied, 380 U.S. 951, 85 S.Ct. 1086, 13 L.Ed 2d 970; Boyer v. City of Orlando, 5 Cir., 1968, 402 F.2d 966, 968; Baker v. Sard, 1969, 137 U.S. App. D.C. 139, 420 F.2d 1342." Calley v. Callaway, supra, at 702 (footnote omitted; emphasis supplied).

Interestingly enough, even the Calley court realized that it was dealing with a postconviction application for release. The cases cited in Calley stand for that proposition alone, and do not, in that regard, apply to the instant case. Aronson v. May, supra, has been discussed in detail. However, even the remaining cases contain very similar fact patterns. Each of those cases, with the lone exception of Baker v. Sard, 420 F.2d 1342 (D.C. Cir. 1969), deal with postconviction applications after a judicial determination of guilt in a criminal conviction. In Baker, the petitioner sought review after a full parole revocation hearing which resulted in a revocation of his parole. In the instant case, we have not even arrived at that juncture.

Significantly, in Baker, after setting forth the general rule of "exceptional circumstances" for release in a postconviction collateral attack, the Court, at pages 1343-1344, went on to state that the substantiality of issues and the threat of flight are further factors to be considered. Curiously enough, one of the issues raised in Baker was the fact that the terms of release had not been explained to him. This, inter alia,

was characterized by the Court as substantial. In Galante's case, the preliminary hearing demonstrated that the conditions had not been explained to him and it was shown that there was no danger of flight. How much more compelling is release when these issues have been administratively determined in appellant's favor.* Thus, even the Calley case, so heavily relied upon by the appellees, draws a careful distinction between postconviction relief and Galante's situation.

The case of Yanish v. Barber, 73 S.Ct. 1105, 97 L.Ed. 1637 (1953) (opinion of Douglas, J., on application for bail) is most enlightening and analogous to the instant case. Yanish was arrested under a deportation warrant as a member of the Communist Party and released on bond. Yanish was found to be deportable and that finding was affirmed by the Board of Immigration Appeals. Thereafter Yanish refused to execute a bond containing additional provisions and sought relief from those conditions. The application was denied and he was taken into custody. A petition for writ of habeas corpus seeking release was denied as was bail in both the District Court and the Court of Appeals. In admitting Yanish to bail, Justice Douglas stated:

"This alien's appeal apparently will not be disposed of by the Court of Appeals within the six month's period specified in § 242(c) of the Act [Immigration and Naturalization Act, 8 U.S.C. § 1952(c)]. If bail is not granted, there will be no way for the applicant to test the question of the power of the Attorney

* We would submit that the apparently unusual reduction of charges by 60% at the preliminary interview must also be considered in this light.

General to attach these conditions to the bond. For he will either have to suffer the conditions or remain in custody for the whole of the six months." Yanish v. Barber, supra, 97 L.Ed. at 1641.

This, rather than the reasoning of Calley, we submit, is applicable to the instant case. Galante remains in jail without any finding of guilt by either the Parole Commission or a court and, because of the intricate procedures involved in parole revocation and the possible extensions of time, he may languish there for months - having been incarcerated since October 11, 1977.

At present, the revocation hearing is scheduled to commence on December 14, 1977. Assuming that all proceeds smoothly and within one week (i.e. December 21), the hearing is concluded, a determination against appellant need not be made for another three weeks (18 U.S.C. § 4214(e)). At that stage, appellant would be incarcerated for three months. Thereafter, an application for reconsideration could be lodged within 30 days and the Commissioner has an additional 30 days to render its decision. 18 U.S.C. § 4215(a). At this juncture, Galante would have been incarcerated for five months. An additional thirty days is available to appeal to the National Appeals Board which must act within sixty days. 18 U.S.C. § 4215(b). At this stage, the revocation would at last be final at which point Galante would have been incarcerated for eight months prior to a final administrative determination.

Although not completely abandoning Aronson and Yanish, we respectfully submit that this Court, in Argro, placed unwarranted

emphasis upon the reasoning of Calley. However, the Argro court realized that:

"In the case of a parolee convicted of a new offense while on parole, we would think release on bail pending a revocation hearing under challenge to be proper only under the most unusual circumstances. Cf. Calley v. Callaway, 496 F.2d 701 (5th Cir. 1974). See Douglas, J. upon an application for bail in Aronson v. May, 85 S.Ct. 3, 5, 13 L.Ed. 2d 6 (1975)."
Argro v. United States, supra, at 1378.
(Emphasis supplied).

The unique facts and circumstances of this case clearly remove it from the rationale of Calley and Argro.

POINT III: THE DETERMINATION TO
PROCEED BY WARRANT RATHER THAN
SUMMONS WAS VIOLATIVE OF DUE PROCESS

As pointed out above, the Parole Commission elected to proceed by warrant rather than summons in initiating the revocation proceedings herein. We submit that the record demonstrates that such a determination constituted an arbitrary and capricious act, constituted an abuse of discretion, and was violative of due process. Unquestionably, a parolee facing possible revocation is entitled to due process. Morrissey v. Brewer, supra, at 488-489:

"Our task is limited to deciding the minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of the evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole."

As the Court noted, it was not defining the outer parameters of due process available to a parolee facing possible revocation. In fact, just prior to Morrissey, this Court had gone even farther in the area of due process. In an opinion by Judge Frankel which was adopted by this Court, it was stated that:

"...the controlling doctrine here is that a probationer (like a prisoner, parolee or mandatory releasee) 'retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.' Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), cert. denied, 325 U.S. 887, 65 S.Ct. 1568, 89 L.Ed. 2001 (1945). Rights like the freedom to speak, Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971) (prisoners); Sobell v. Reed, 327 F.Supp. 1294 (S.D.N.Y. 1971) (parolees), to pursue legal remedies, Corby v. Convoy, 457 F.2d 251 (2nd Cir. 1972) (prisoners), to have counsel, Gunsolers v. Gagnon, 454 F.2d 416 (7th Cir. 1971 (parolees)); People ex rel. Menechino v. Warden, 27 N.Y.2d 376, 318 N.Y.S.2d 449, 267 N.E.2d 238 (1971) (Fuld, C.J.) (parolees), and, generally to the due process of law, Hyser v. Reed, 115 U.S. App. D.C. 254, 318 F.2d 225 (D.C.Cir.), cert. denied sub nom. Thompson v. United States Bd. of Parole, 375 U.S. 957 84 S.Ct. 446, 11 L.Ed. 2d 315 (1963) are largely or wholly unimpaired." United States v. Manfredonia, 341 F.Supp. 790, 794-795 (S.D.N.Y. 1972), aff'd on opinion of District Court at 459 F.2d 1392 (2nd Cir. 1972).

The facts and circumstances herein are certainly unique. After an unblemished record and a history of cooperation, the Parole Commission arbitrarily determined to issue a summons rather than a warrant. Joseph A. Nardoza, Regional Commissioner, in response to an inquiry by Judge Ward as to why the summons procedure was not implemented, stated that although a summons had been considered, based upon a 1962 pre-sentence report and the alleged frequency and seriousness of the violations, the Commission elected to proceed by warrant. As this Court is aware, in 1962, Galante's counsel could not examine the pre-sentence report to point out any inaccuracies. Furthermore, the frequency of the violations has seriously been challenged by Mr. Hurley, a representative of the Parole Commission. Finally, the "seriousness" of the violations

must be questioned. Obviously the seriousness of associations is not so great as the conviction for a crime subsequent to parole. (Schreiber, Argro, Berardelli) or for alleged criminal activities (Ciambrone).

The appellees have repeatedly treated this case as one wherein the appellant's parole has already been revoked. Such is not the case. Even if the Parole Commission finally determines that Galante has associated with those persons named in the application for the warrant, it may still continue him on parole. 18 U.S.C. § 4214; United States ex rel. Vance v. Kenton, 252 F.Supp. 344, 346 (D. Conn. 1966).

The Nardoza affidavit below is nothing more than a smokescreen to justify never using a summons to initiate a parole revocation proceeding. It must be remembered that Nardoza's affidavit was signed on October 19, eight days after this proceeding began. At this point, in failing to answer Judge Ward's inquiry (Tr. 111 - 117 -- 10/14/77), Nardoza had all the materials and arguments submitted prior to this on which to rely on. This was the perfect opportunity to fabricate a justification for the implementation of a warrant rather than a summons. The critical document is in reality the Kuznesof affidavit of October 12, 1977 (22A & ff). As Mr. Kuznesof stated:

"Warrants have always been issued for alleged parole and mandatory release violators known to the Southern District of New York." (22A).

Apart from the factors Nardoza allegedly considered, he also states that Galante's prior criminal record was given consideration. Having paid his debt to society, we submit that Galante should no longer be penalized for his past transgressions. As Nardoza concedes, a summons has never been used in the Northeast Region. Why not? Apparently because, in Nardoza's opinion, the appropriate case has never been presented. This attitude flies in face of Congress having created the summons procedure and is totally at odds with the Congressional Committee Report on this statute.

"This section [18 U.S.C. § 4213(a)] provides that the Commission may initiate revocation proceedings using either a summons or a warrant procedure. It is the intent of the Conferees that the Commission should minimize the disruption of the parolee's life in any revocation proceeding. One means by which this intent has been implemented in [sic] giving the Commission discretion to use either a summons or warrant when a condition of parole has been violated. However, the Conferees recognize that use of a summons for parolees with prior adult or juvenile records may simply be inappropriate." Parole Commission and Reorganization Act, House Conference Report 94-838, 94 Congress, Second Session 33 (1976).

The "criteria" allegedly used by Nardoza in determining to use a warrant rather than a summons could be said to exist for any alleged parole violator--any alleged violation could be subjectively termed "serious", all parolees have a prior criminal record and, at least in Federal Court, a pre-sentence report, and any alleged violation could be found repetitive. Thus there was no exercise of discretion, but merely an arbitrary hindsight

examination of certain "criteria" and a blanket decision to employ the warrant procedure. Such methods are tantamount to saying that all persons convicted of a particular crime must receive no more and no less than five year sentence. This practice has been soundly condemned, see Woolsey v. United States, 478 F.2d 139, 141-145 (8th Cir. 1973).

Judge Ward was troubled by the final sentence of the above excerpt from the Committee Report. The appellees argued that that language applied to a person such as Galante who has a criminal record prior to the offense for which he is on parole. However, reading that sentence in the context of the report indicates that in all probability, the Committee was simply referring to a criminal record subsequent to parole. See Hyser v. Reed, 318 F.2d 225, 262. (D.C. Cir. 1963, en banc) (dissent, Wright, J.); Morrissey v. Brewer, supra, at 497 (dissent, Douglas, J.).

The time factor of these proceedings once again becomes critical. Galante has remained in jail for nearly a month--not convicted of a criminal offense or even charged with one. Several more months will easily pass before a final determination is made on revocation. Such a condition does not comport with any accepted standards of due process.

"A revocation hearing must be held within a reasonable time after the parolee's rearrest. United States ex rel. Buono v. Kenton, 287 F.2d 534 (2 Cir.) cert. denied, 368 U.S. 846, 82 S.Ct. 75, 7 L.Ed. 2d 44 (1961). If detention extends beyond a reasonable time, habeas corpus

will lie during that period. United States ex rel. Buono v. Kenton, supra, 287 F.2d 36, cf. Escoe v. Zerbst, 295 U.S. 490, 494, 55 S.Ct. 818, 79 L.Ed. 1566 (1939)." United States ex rel. Vance v. Kenton, supra, at 346; see also, United States ex rel. Buono v. Kenton, 287 F.2d 534, 536 (2nd Cir. 1961), cert. denied 368 U.S. 846; Hyser v. Reed, supra (dissent); Morrissey v. Brewer, supra (dissent).

As Judge Wright stated in his partial dissent in Hyser:

"Where serious violations of parole have been committed, the parolee will have been arrested on charges stemming from those violations. Where the violation of parole is not so serious, no reason appears why he should be incarcerated before hearing."

Similarly, Justice Douglas, in his dissent in Morrissey, at pages 497 and 500, expressed similar sentiments:

"It is only procedural due process, required by the Fourteenth Amendment, that concerns us in the present cases. Procedural due process requires the following.

If a violation of a condition of parole is involved, rather than the commission of a new offense, there should not be an arrest of the parolee and his return to the prison or local jail. Rather, notice of the alleged violation should be given to the parolee and a time set for a hearing."

[footnote omitted]

* * *

"(3) the parole is entitled to the freedom granted a parolee until the results of the hearing are known and the parole board--or other authorized state agency--acts."

Significantly, these excerpts from Hyser and Morrissey are invaluable in understanding the Congressional Committee Report. A reading of these dissents indicates that a "serious violation" is one which results in incarceration--not one which may result

in parole revocation. Clearly the "criminal record" of the Report can only mean a record subsequent to parole. Both Hyser and Morrissey pre-date the Report and the implementation of the summons procedure. The Committee was certainly aware of these two leading cases. In employing almost identical language, the meaning is clear--Galante, not accused of any subsequent crime, should have received a summons thus permitting him to remain at liberty to assist in his defense. This Court should limit the use of a warrant to those situations wherein Congress intended it to be employed--a subsequent criminal charge.

POINT IV: UNUSUAL CIRCUMSTANCES
AND A HIGH PROBABILITY OF SUCCESS
DO EXIST.

The appellees argued in the court below that in order to prevail on this application, the appellant must demonstrate unusual circumstances and a high probability of success. While we absolutely dispute the applicability of these criteria to the instant case, we submit that we have met these requirements.

The unusual circumstances enumerated in Calley are inapplicable. All once again deal with a collateral attack on a criminal conviction for which the petitioner was then incarcerated. However, as pointed out above, there are special circumstances herein such as a non-judicial incarceration, no probability of flight, potential length of time of incarceration without determination, an unblemished four year record of parole, constant communication with the Probation Department and the like. Not wishing to burden this Court with a repetition of the arguments submitted in Points I, II and III, the Court is respectfully referred to them and asked to consider those arguments as applicable to the instant question..

The question of Galante's probability of success is also answerable. Many of the 18 remaining allegations are in a social context which, we submit, we will be able to demonstrate. Furthermore, we do not believe that a ten minute chance occurrence (as found in many of the instances) constitute "association" as defined in Arciniega v. Freeman, 404 U.S. 4 (1971); Birzon v. King, 469 F.2d 1241 (2nd Cir. 1972); or United States v. Albanese, 554 F.2d 543 (2nd Cir. 1977).

Overriding this entire discussion (and in addition to the procedural errors pointed out in Point III herein) is the fact that due process was violated in this instance when the Probation Department admittedly failed to advise Galante of the terms and conditions of his release. See: Morrissey v. Brewer, supra; Baker v. Sard, supra. It is inconceivable that Galante, or anyone, can know what is required of a man on parole without the advice of the officers who must be presumed to know the guidelines. To say that he is an experienced parolee does not take into account the possibility of change in the law or change in a parolee's status to that of a mandatory releasee.

A further point must be noted. Even assuming that in the final analysis, the Parole Commission decides to find that Galante did violate his parole, this does not end the inquiry.

"Whether or not there has been a transgression is only the first of two decisions which must be reached following a Section 4207 hearing. Loss of parole status and reincarceration are not automatic consequences of parole infraction. The statute also requires the Board to determine whether the violator is still a good parole risk. A breach of release conditions is but one element, albeit a forceful one, to be considered. The parolee may bring other factors to the attention of the Board which may induce it to give him another chance. 18 U.S.C. §4207; Stubblefield v. Kennedy, 117 U.S. App. D.C. 225, 328 F.2d (1964); Hyser v. Reed, supra, 318 F.2d at 238. Note, Rights of a Federal Parolee threatened with Parole Revocation, Washington University Law Quarterly 337, 351 (1964).

"An accused violator, therefore, should be presented within a reasonable time not only to respond to the charges against him, United States ex rel. McCreary v. Kenton, 190 F. Supp. 689, 691 (D.Conn. 1960), but also to attempt to convince the Board that, notwithstanding the violation, his parole should be continued under the same or some other terms and conditions. Months of incarceration prior to the hearing, in addition to being fundamentally unfair, effectively nullify this opportunity." United States ex rel. Vance v. Kenton, supra, at 346.

CONCLUSION

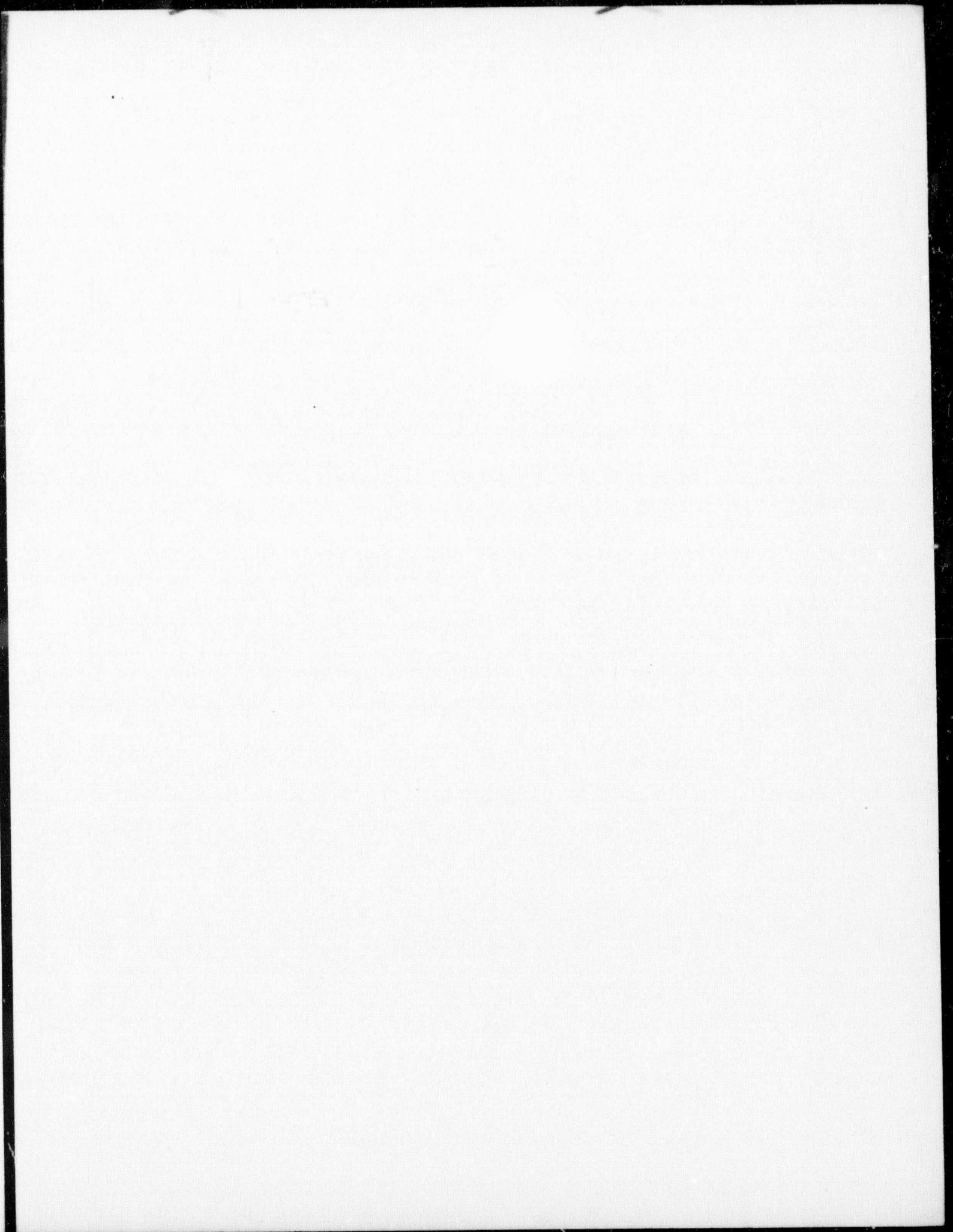
In conclusion, the law and facts clearly merit a reversal of the District Court and the admission of the appellant to reasonable bail.

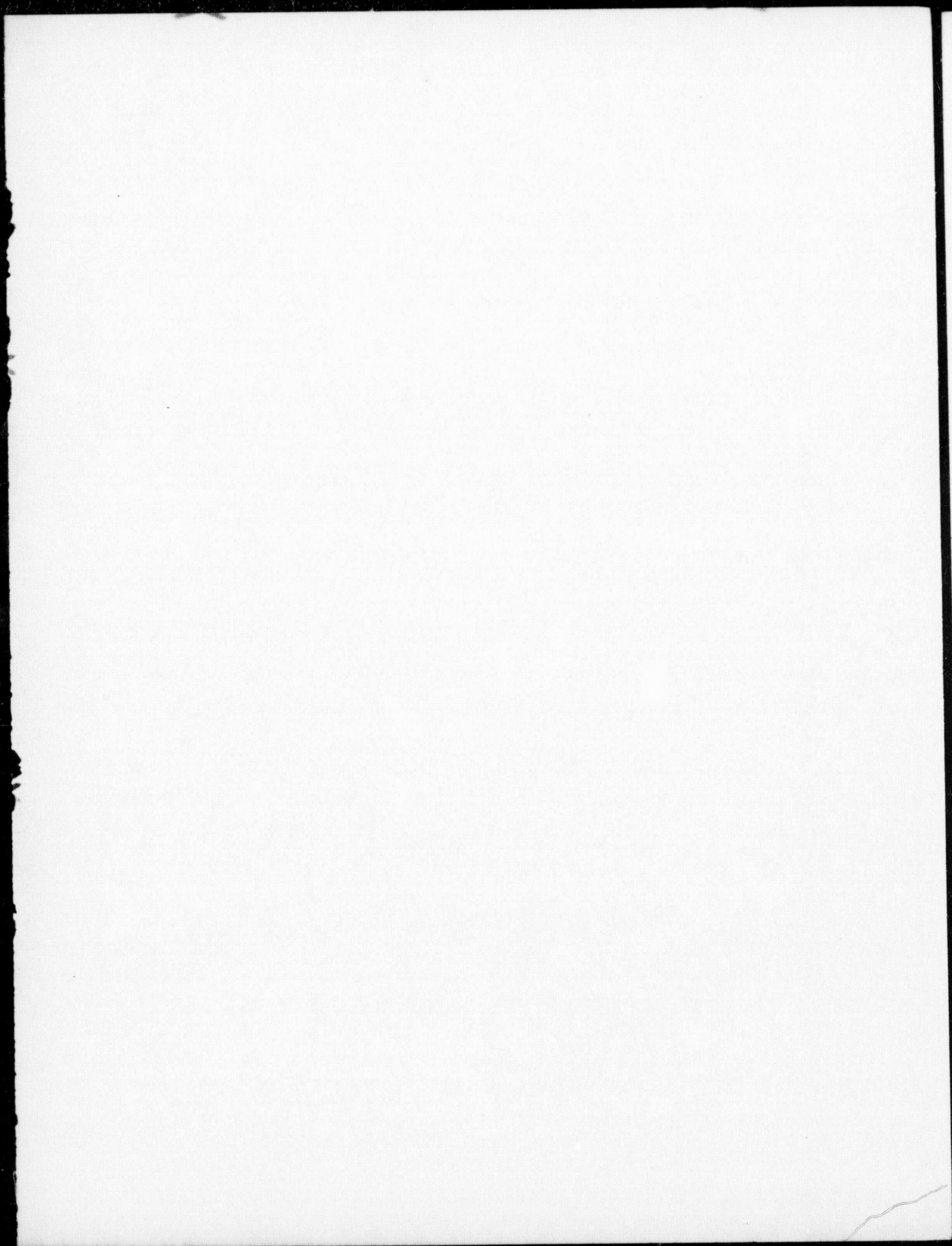
Dated: New York, New York
November 10, 1977

Respectfully submitted,
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